Supreme Court, U.S.
FILED
AUG 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1923

In the Supreme Court of the United States

OCTOBER TERM, 1986

RIENK KAMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that his statutory right to a speedy trial was violated because the district court granted a continuance over his objection.

1. An indictment returned in the United States District Court for the Central District of California charged petitioner, a citizen of the Netherlands, with 57 counts of conspiracy, mail fraud, and wire fraud, in violation of 18 U.S.C. 371, 1341, and 1343. Following his extradition to the United States, petitioner was arraigned on the indictment on July 10, 1984. On August 23, 1984, counsel for petitioner requested a continuance of the trial date from September 18, 1984, to January 8, 1985, stating that the additional time was needed for trial preparation. Pet. App. 27, 55. Petitioner, who was unable to make bail and therefore was incarcerated prior to trial, objected to the continuance; he acknowledged, however, that if he were released, he could

use six months to prepare for trial with his lawyer (8/29/84 Tr. 7). The government did not oppose the request for a continuance, stating that additional defense preparation time was necessary for there to be "a fair and competent trial" (*id.* at 13).

On September 11, 1984, the district court granted the continuance and ordered the exclusion of the resulting delay from the calculation of the 70-day arraignment-to-trial period mandated by Section 3161(c)(1) of the Speedy Trial Act (18 U.S.C. (& Supp. II) 3161 *et seq.*). See 18 U.S.C. 3161(h)(8). Petitioner thereafter moved to represent himself. That motion was granted on September 25, 1984, and petitioner's former attorney was appointed to serve as standby counsel. Pet. App. 56.

On November 30, 1984, petitioner moved to dismiss the indictment, asserting a violation of the Speedy Trial Act. The district court never ruled on the speedy trial motion, however, because petitioner entered an unconditional plea of guilty to three counts of the indictment on December 11, 1984.[1] Petitioner was sentenced to 16 months' imprisonment, to be followed by five years' probation. As a condition of the probation, petitioner was ordered to make restitution and to re-enter the United States only with the approval of the Attorney General.

2. On appeal, the court of appeals vacated petitioner's plea, finding that the district court had not complied with Fed. R. Crim. P. 11 during the plea hearing (Pet. App. 28-54). But the court of appeals rejected petitioner's claim that the indictment should have been dismissed on speedy trial grounds. The court held that the ends-of-justice continuance did not terminate on September 25, 1984, when

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[1]Petitioner pleaded guilty to one count each of conspiracy, mail fraud, and wire fraud.

petitioner was permitted to represent himself, noting that petitioner's appointed attorney continued in the role of standby counsel and needed additional time to prepare to assist at trial. *Id.* at 56-57. The court also explained that "the case was a complex one. There were numerous overseas documents, most of which are in the Dutch language. And, of the more than 70 witnesses, many reside in Europe." *Id.* at 57. The court of appeals accordingly held that the district court had acted within its discretion in granting the continuance and in excluding the period of the continuance from the speedy trial calculation (*ibid.*).

3. Petitioner now contends that the court of appeals should have ordered the indictment dismissed for violation of the Speedy Trial Act. Review of this contention, however, would be premature. By reversing petitioner's conviction and vacating his guilty plea, the court of appeals placed petitioner in precisely the same position as that of any defendant awaiting trial. Such a defendant is not entitled to appellate review of his speedy trial claim until he is convicted. See *United States* v. *Hornung*, 785 F.2d 868, 869 (10th Cir. 1986); *United States* v. *Crawford Enterprises*, 754 F.2d 1272, 1273 (5th Cir. 1985); *United States* v. *Moller-Butcher*, 723 F.2d 189, 191 (1st Cir. 1983); *United States* v. *Mulherin*, 710 F.2d 731, 743 (11th Cir.), cert. denied, 464 U.S. 964 (1983); *United States* v. *Grabinski*, 674 F.2d 677, 680 (8th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982); *United States* v. *Bilsky*, 664 F.2d 613, 617-619 (6th Cir. 1981); *United States* v. *Mehrmanesh*, 652 F.2d 766, 770 (9th Cir. 1980). Cf. *United States* v. *MacDonald*, 435 U.S. 850, 856-863 (1978) (no interlocutory review of Sixth Amendment speedy trial claims). If petitioner is acquitted following a trial on the merits, his contention will be moot.[2]

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[2]We note that petitioner may be deemed to have abandoned his speedy trial claim when he pleaded guilty. It had not been ruled on by the district court, and petitioner was not entitled to review of his

In any event, petitioner's statutory right to a speedy trial was not violated in this case. The Speedy Trial Act requires trial within 70 days of arraignment. 18 U.S.C. 3161(c)(1). Certain periods of delay, however, must be excluded from the 70-day calculation. See generally *Henderson* v. *United States*, No. 84-1744 (May 19, 1986), slip op. 5. One such period is that marked by an ends-of-justice continuance, which the district court may grant in the exercise of its "broad discretion" if, among other things, the case is complex or counsel need additional time to prepare for trial. 18 U.S.C. 3161(h)(8)(B)(ii) and (iv). See *United States* v. *Rojas-Contreras*, No. 84-1023 (Dec. 16, 1985), slip op. 5. An ends-of-justice continuance may be granted sua sponte by the court, or upon the request of the defendant, his attorney, or the prosecutor. 18 U.S.C. 3161(h)(8)(A). Nothing in the Act requires that the defendant consent to the granting of such a continuance.

Both courts below plainly were correct in finding that this case was complex. The 57-count indictment charged an international scheme to defraud. Many of the witnesses were foreign, and many of the documents at issue had to be translated into English. See Pet. App. 56-57. Petitioner does not deny that his appointed counsel needed a lengthy continuance to prepare for trial. Indeed, petitioner acknowledged that he himself needed additional preparation time. He opposed the continuance not because he was ready for trial, but because he could not post bail and wished to

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unresolved motion in the court of appeals. See *United States* v. *Yunis*, 723 F.2d 795, 796 (11th Cir. 1984) (a guilty plea waives appellate review of a speedy trial claim); *United States* v. *Broussard*, 645 F.2d 504, 505 (5th Cir. 1981) (same); *United States* v. *Gaertner*, 583 F.2d 308, 311 (7th Cir. 1978), cert. denied, 440 U.S. 918 (1979) (same); *United States* v. *Lee*, 500 F.2d 586, 587 (8th Cir.), cert. denied, 419 U.S. 1003 (1974) (same); *United States* v. *Mann*, 451 F.2d 346, 347 (2d Cir. 1971) (same).

terminate his pretrial confinement by going to trial immediately. 8/29/84 Tr. 4-7. In granting the ends-of-justice continuance, the district court properly focused on petitioner's right to a fair trial, rather than on his desire for release from pretrial incarceration.

For the same reason, the continuance cannot be deemed to have expired automatically on September 25, 1984, when petitioner was permitted to represent himself. Standby counsel still had to prepare in the event that he was asked to assist at trial (see 9/25/84 Tr. 32-33), and petitioner, who was not versed in American criminal law, had not yet had adequate time to prepare his defense. The court of appeals accordingly was correct in holding that the district court did not abuse its discretion in granting an ends-of-justice continuance in the circumstances of this case. That factual conclusion does not warrant further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1986

DOJ-1986-08